

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

JOHN F. CORCORAN, CLERK
BY: *John F. Corcoran*
DEPUTY CLERK

This case was brought by Betty Salyers against Lowe's Home Centers, Inc., ("Lowe's"). This court has diversity jurisdiction to decide this matter pursuant to 28 U.S.C. § 1332. The case was referred to the Honorable Pamela Meade Sargent, United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(B). Presently before the court is the defendant's motion for summary judgment, (Docket Item No. 6), ("Motion for Summary Judgment"), which was filed on March 21, 2007. The plaintiff filed no response to the Motion for Summary Judgment within the 30 days required by the Scheduling Order and, as a result, the Motion for Summary Judgment was properly treated as unopposed by the plaintiff. On April 20, 2007, the Magistrate Judge submitted a report and recommended disposition of this case recommending that the Motion for Summary Judgment be granted, (Docket Item No. 11), ("Report"). No objections to this Report were filed and, thus, the Magistrate Judge's recommendation that the Motion for Summary Judgment be granted remains unopposed. Instead of objecting to the Report, the plaintiff filed a motion for voluntary dismissal pursuant to Rule 41 of the Federal Rules of Civil Procedure, on May 9, 2007, (Docket Item No. 12), ("Motion for Voluntary

Dismissal"). The court, on a review of the record, is of the opinion that the Magistrate Judge's Report should be accepted, the Motion for Summary Judgment should be granted and the Motion for Voluntary Dismissal should be denied.

Because the defendant already has responded to the plaintiff's complaint with a motion for summary judgment, and because the plaintiff does not have the consent of the defendant, the plaintiff cannot dismiss this case without the consent of this court. *See Comacho v. Mancuso*, 53 F.3d 48, 51 (4th Cir. 1995). Whether to grant a motion to dismiss pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure is within this court's discretion. *See Davis v. USX Corp.*, 819 F.2d 1270, 1273 (4th Cir. 1987). The Fourth Circuit has expressly approved denial of a plaintiff's motion for voluntary dismissal where summary judgment is "imminent." *Davis*, 819 F.2d at 1274. *See also Armstrong v. Frostie Co.*, 453 F.2d 914, 916 (4th Cir. 1971). It is within the district court's discretion to deny a motion for voluntary dismissal if the defendant would be unfairly prejudiced by dismissal. *See S. A. Andes v. Versant Corp.*, 788 F.2d 1033, 1036 (4th Cir. 1986). Furthermore, expenses of discovery and preparation of a motion for summary judgment may constitute sufficient prejudice to support denial of a motion for voluntary dismissal. *See Andes*, 788 F.2d at 1036-37.

In this case, the Magistrate Judge already had reviewed the evidence and submissions, and filed a report and recommendation examining the defendant's Motion for Summary Judgment. At no point has the plaintiff made any effort to refute the defendant's overwhelming evidence that summary judgment is warranted in this case. Additionally, the defendant already has incurred expenses associated with conducting discovery in this case, including the depositions of at

least two people, as well as the costs associated with preparation of its Motion for Summary Judgment. Therefore, it is this court's determination that summary judgment was imminent against the plaintiff, and it would be prejudicial to the defendant to allow the Motion for Voluntary Dismissal. *See Davis*, 819 F.2d at 1274, *Andes*, 788 F.2d at 1036-37; *see also Armstrong*, 453 F.2d at 916. Moreover, based on the evidence presented in this case, this court believes that it would be a waste of judicial resources to allow this case to continue when it is apparent from the record that the case should be dismissed.

Thus, for the reasons detailed in the Magistrate Judge's Report, and the reasons explained above, the Report is **ACCEPTED** and the defendant's Motion for Summary Judgment is hereby **GRANTED**. The plaintiff's Motion for Voluntary Dismissal is **DENIED**. Judgment for the defendant is hereby entered. The Clerk is directed to enter this Order and to send copies of this Order to all counsel of record. The Clerk is further directed that this case is to be closed and stricken from the docket.

ENTER: This 17 day of May, 2007



THE HONORABLE GLEN M. WILLIAMS
SENIOR UNITED STATES DISTRICT JUDGE